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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 306

ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDWARD F. HUBER
61 Broadway
New York, New York 10006

T. CARL NIXON
31 Exchange Street
Rochester, New York 14614
Attorneys for Petitioner.

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on April 6, 1965 insofar as it affirmed an order of Respondent (Commission) directing Petitioner to apply for a license under the Federal Power Act for hydroelectric projects on the Genesee River.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (Waterman, J.) dated April 6, 1965, is reported at 344 F. 2d 594. A copy is set forth in the Appendix, pp. 1a-12a, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on April 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §313(b) of the Federal Power Act (herein called the Act), 16 U.S.C. §825*l*.

Question Presented

May Petitioner's three hydroelectric plants on the Genesee River at Rochester, New York properly be determined to be on "navigable waters" within the meaning of the Act and, accordingly, be required to be licensed by the Commission, on a finding of *past* suitability of the relevant reach of the river for use in interstate commerce, notwithstanding that the criteria of "navigable waters" as used in the Act, set forth in §3(8) thereof, do not include *past* suitability for use.

Statutes Involved

The pertinent provisions of the Act, *viz.* §3(8) (16 U.S.C. §796(8)), §4(e) (16 U.S.C. §797(e)), 4(g) (16 U.S.C. §797(g)), §23(b) (16 U.S.C. §817), §313(b) (16 U.S.C. §825 *l* (b)), and Section 9 of the River and Harbor Act of 1899 (33 U.S.C. §401), are set forth in the Appendix, pp. 23a to 29a, *infra*.

Statement

Petitioner owns and operates four small hydroelectric developments on the Genesee River, in Western New York, all of which were originally constructed prior to 1920, the year in which the Act was enacted. Three projects are on a two-mile stretch of rapids and falls in Rochester, six miles from the mouth of the river. The fourth project is

at Mount Morris, New York, on another turbulent stretch of the river, sixty-five miles from its mouth. These have never been licensed by the Commission.

The first sentence of §23(b) of the Act, added by amendment in 1935 (49 Stat. 846), in pertinent part provides:

> "It shall be unlawful * * * to construct, operate or maintain any dam * * * or other works incidental thereto across, along, or in any of the navigable waters of the United States * * * except under and in accordance with [a permit or right-of-way antedating the Act, or] a license granted pursuant to this Act."

Petitioner's hydro projects are unlicensed. Petitioner had never deemed a license necessary, because it did not consider the Genesee River to be "navigable waters" at the location of its projects. For more than the first forty years after the Act was passed, the Commission indicated no different view.

In 1962 and 1963 the Commission solicited license applications for theretofore unlicensed hydro projects, suggesting that more stringent license terms and conditions would be imposed on "recalcitrants" than on others. On March 2, 1964, Petitioner, to make it affirmatively clear that it was not "recalcitrant", filed a petition for a declaratory order by the Commission that, at the location of its hydro projects, the Genesee was not "navigable waters", and accordingly that a license for the projects was not required. That petition is the foundation of this case. In accordance with the Commission's rules, the petition contained a statement of the facts to support the requested order.

The Commission held no hearing, and had no evidence before it other than that contained in the petition. On

July 7, 1964 the Commission issued a Declaratory Order (pp. 13a to 17a, *infra*) which contained this crucial finding:

> "(1) The Genesee River from above the Rochester Gas and Electric Company's project works to its mouth at Lake Ontario is a 'navigable water of the United States' within the meaning of subsection 23(b) of the Act."

The order directed the filing of a license application within ninety days. Rehearing was duly applied for and was denied (pp. 18a to 23a).

Petitioner applied to the court below for a review of the Declaratory Order. The broad question before the court was whether the Commission's finding, just quoted was supported by substantial evidence. Specifically, this was a question whether there was substantial evidence that each of the four projects is located on "navigable waters". The Court affirmed the Order as to the three Rochester projects, vacated it as to the Mount Morris project, and remanded the case for the taking of additional evidence relevant to the latter. The three Rochester projects are all we are now concerned with.

"Navigable waters", as used in the Act, is a defined term. Section 3 commences:

> "The words defined in this section shall have the following meanings for purposes of this Act, to wit;"

Subdivision (8) of §3 provides:

> "(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interrup-

> tions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.'"

The issue of "navigable waters" as to the three Rochester projects was narrowed to the reach of the river above these plants. Notwithstanding that the Genesee is not navigable in fact at the falls and rapids location of the three Rochester projects, it was and is conceded that, under the "interruptions" provision of §3(8), they are nevertheless on "navigable waters" if the river above and below the plants is "navigable waters". Because the Genesee is concededly "navigable waters" from a point below the projects to its mouth at Lake Ontario, only the reach above the plants was in issue.

The issue as to this reach was narrowed to the legal question: by what criteria is "navigable waters" to be determined. It was and is Petitioner's contention that only the criteria explicitly stated in §3(8) may be applied. They are all stated in the present tense:

1. Actual use,
   or
2. suitability for use

in "natural or improved condition * * * for the transportation of persons or property in interstate or foreign commerce".

Or in the alternative of 1 or 2,

3. "authorized by Congress for improvement by the United States"; or

4. "recommended to Congress for such improvement after investigation under its authority."

5. Only where the criteria otherwise apply, "interruptions between the navigable parts of such streams or water by falls, shallows, or rapids compelling land carriage" are "navigable waters."

These are the only criteria of §3(8). There are no others.

These criteria explicitly require consideration of a stream's *present* use and improvement status. Although purporting to apply §3(8),[1] the court below held the relevant stretch to be "navigable waters" on the basis of long *past* suitability for use in interstate commerce.[2] The application of this criterion was supported exclusively[3] by a statement of this Court in *United States* v. *Appa-*

1. "The parties agree that petitioner must comply with the Commission's order if, but only if, the four projects are located on 'navigable waters' within the meaning of Section 3(8) of the Act, 16 U.S.C. §796 (8): * * *" (p. 2a, *infra*).

2. "The Commission made no finding that the Genesee River, except for the six miles at its mouth, *presently* is being used or is suitable for use as an avenue of interstate or foreign commerce.

"The Commission found that the Genesee River has been used or was suitable for use in the *past* from above the rapids and falls in Rochester to the power project at Mount Morris.

* * *

"We hold that petitioner's statements regarding use of the river channnel from 1812 to 1840 constituted substantial evidence supporting the Commission's finding that the Genesee River is 'navigable waters' above the rapids and falls in Rochester. Accordingly, we affirm the Commission's order insofar as it directs petitioner to apply for licenses for the three power projects in Rochester." (pp. 6a and 7a, *infra*).

3. The Court of Appeals accepted as permissible, but found inapplicable for lack of evidence, the criterion of navigability announced by this Court in *Appalachian*, of feasibility of interstate use after future improvement if economically practicable even though not authorized (pp. 11a and 12a, *infra*.)

lachian Electric Power Co., 311 U. S. 377 (1940), which was quoted as follows (p. 4a, *infra*):

> "• • • There the Supreme Court stated, with regard to use or suitability for use in the *past*: 'When once found to be navigable, a waterway remains so • • • Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense.'"

The Court of Appeals deliberately engrafted on §3(8) of the Act criteria unstated in that definition, but judicially stated in *Appalachian*, notwithstanding Petitioner's clear warning that *Appalachian* arose under the River and Harbor Act of 1899, did not involve an interpretation of §3(8) of the Act, did not purport to interpret §3(8), and was inapplicable. The court did not dispute the statement, but brushed it aside. Its sole excuse for doing so was purported precedent:

> "• • • However plausible this contention may have been at one time, it is no longer arguable now. Every court which has considered the question, including our own, has treated the quoted portions of *United States* v. *Appalachian Elec. Power Co.* as fully applicable to the definition of 'navigable waters' in Section 3(8)." [citing cases] (pp. 4a and 5a, *infra*)

That the courts in the cases cited had not really "considered the question", and are not really precedential authorities, will be developed in the argument supporting the reasons for granting the writ. But more important is the fact that this Court has not passed on the "question". There are compelling reasons why it should do so.

Reasons for Granting the Writ

The question whether the licensing power of the Commission over "navigable waters" is expanded by *Appalachian* beyond the limits stated in §3(8) has never been decided by this court. It could affect many hydro projects long since constructed, but never licensed, on streams whose actual use or suitability for use was in the distant past, and which Congress neither authorized nor recommended for improvement. What was done in *Federal Power Commission* v. *Union Electric Company*, 85 Sup. Ct. 1253, decided May 3, 1965, and for the same reason, should be done here:

> "• • • Because the question is an unresolved one of jurisdiction over an important class of hydroelectric projects, we granted certiorari, 379 U. S. 812, and now reverse the judgment of the Court of Appeals." (85 Sup. Ct. 1253, 1255.)

The decision of the court below rests on an interpretation of the Act purportedly in accordance with a decision of this Court, but actually in conflict with its decisions. It would erroneously substitute judicial criteria for the criteria of Commission jurisdiction established by Congress. These judicial criteria would vastly expand the Commission's "navigable waters" licensing jurisdiction. Thus the reach of the decision in its specific context, the Commission's licensing jurisdiction, is far beyond this case and this Petitioner.

The reach of the decision extends far beyond its specific context. In principle it sanctions the violation of any definition—of any limitations—established by Congress. Precedent for a principle so dangerous and far reaching should not be permitted to stand.

First, let us make clear that "navigable waters" is a term which does not always mean the same thing.

Prior to the passage of the Act in 1920, "navigable waters of the United States" *as an undefined term* in federal statutes, such as those relating to steamboat inspection and admiralty jurisdiction, had been determined by judicial criteria. By 1920 these criteria had evolved as (1) actual use of a stream, or (2) susceptibility of use, (3) in ordinary and natural condition, (4) in interstate commerce (5) of a substantial and permanent character. *The Daniel Ball*, 10 Wall. (U. S.) 557 (1871); *The Montello*, 20 Wall. (U. S.) 430 (1874); *Leovy* v. *United States*, 177 U. S. 621 (1900).

The interstate commerce element derived from the fact that the source of regulatory power of Congress over waters subject to its jurisdiction is the commerce clause of the Constitution. Thus the broadest scope of congressional power, in the constitutional sense, is *all* waters of the United States, navigable or not, over which Congress may exercise jurisdiction.[4]

The next broadest scope of the exercise of the power of Congress, in the constitutional sense, is over navigable

4. See *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690 (1899), declaring the jurisdiction of Congress over *non*-navigable waters of the United States; and §23(b) of the Act (pp. 25a and 26a, *infra*), in which Congress exercises such jurisdiction. The Commission well understands that in §3(8) Congress did not intend that "navigable waters" should be given unrestricted meaning within its constitutional powers. At page 31 of its Brief, dated April 20, 1963, to the Court of Appeals for the Eighth Circuit in *Union Electric Company* v. *FPC*, the Commission stated: "As the Commission pointed out in its order in this case (R. 157), when the statutory definition of 'navigable waters' was limited to what the courts had already definitively held to be encompassed within the phrase, 'new language *specifically* dealing with the licensing of projects in waters *not* navigable under that definition was added to Section 23 of the proposed Act.'" (Emphasis by the Commission.)

waters subject to its jurisdiction. When congressional power is so exercised, "navigable waters" is properly to be given its widest application. Congress so exercises its power in statutes in which the term "navigable waters" is undefined.

In §3(8) of the Act, Congress *defined* "navigable waters". By that very fact, it showed that it did *not* want the term to be given its widest constitutional application, as theretofore judicially declared. It was selective in fashioning its definition.[5] It accepted and rejected extant judicial criteria, and added other new criteria.

It accepted the judicial criteria of present actual use, or suitability for use, in interstate commerce: "* * * those parts of streams * * * which * * * *are* used or suitable for use for the transportation of persons or property in interstate commerce."

It rejected the then judicial limitation that the criteria of use, or suitability for use, be applied only to the *natural* condition[6] of the stream: "those parts of streams * * * which either in their natural or *improved* condition."

It introduced two new criteria: "authorized by Congress for improvement by the United States", and "recommended to Congress for such improvement after investigation under its authority."

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5. This Court has noted in connection with its recent consideration of the legislative history of the Federal Water Power Act "considerable debate about * * * the definition of navigable waters." *Federal Power Commission* v. *Union Electric Company*, *supra* at p. 1260.

6. In *The Montello*, *supra*, the Court sustained the contention that the natural state of the Fox River in Wisconsin determined whether it was a navigable water of the United States, notwithstanding that, by reason of improvements, there was "uninterrupted water communication for steam vessels of considerable capacity from the Mississippi to Lake Michigan, and thence to the St. Lawrence through the Wisconsin and Fox Rivers; . . ."

All this shows that in §3(8) Congress deliberately developed a definition of "navigable waters"—a term which was to limit the scope of the Commission's jurisdiction. It shows that Congress intended §3(8) to mean what it says.

Nevertheless, according to the court below, "navigable waters" *as defined* in §3(8) in 1920, instead of meaning what §3(8) says, means what this Court in *Appalachian* said "navigable waters" meant twenty years later *as an undefined term in another statute.*

Appalachian arose under the River and Harbor Act of 1899. It was concerned with a determination whether a reach of the New River was "navigable waters of the United States", a term which was *not defined* in the River and Harbor Act. It was concerned with the unrestricted meaning of the term within the constitutional power of Congress. It was in this broad constitutional sense that this court declared the criterion of past navigability which the court below applied in this case:

> "• • • When once found to be navigable, a waterway remains so. • • • Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers *in the constitutional sense.*" (311 U. S. 377, 408, 409; p. 4a, *infra;* emphasis supplied.)[7]

Clearly, this Court did not purport to declare a criterion of "navigable waters" in other than the broad constitutional sense, which is not involved here. It did

7. This statement was made on the authority of *Economy Light & Power Co.* v. *United States*, 256 U. S. 113 (1921), which also arose under the River and Harbor Act of 1899. It did not involve, and could not have involved, §3(8). It could not have influenced §3(8), because it was instituted before, and decided after, the Federal Water Power Act was passed.

not purport to declare a criterion of "navigable waters" in the narrower statutory sense of §3(8) which was not involved there.

The only mention of §3(8) in *Appalachian* but serves to emphasize that the Court did not purport to construe, or to engraft new criteria on, the statutory definition of navigable waters. The Court accepted the contention of the government, which had been rejected in both courts below, that navigability could be determined "in the light of the effect of reasonable improvements" (311 U. S. at p. 406). In doing so the court in effect established a new judicial criterion, "improvability". Contrary to *The Montello*, *supra*, it sanctioned a determination of "navigable waters" on the basis of improved, rather than natural, condition. This innovation[8] was supported by the citation of §3(8) as recognition by Congress of its power over a stream as "navigable waters" when used or suitable for use in its improved, as well as in its natural condition.[9] If Congress exercised power over a stream as "navigable waters" when usable only after improvement authorized by it, as exemplified by the *defined* term in §3(8), the Court properly could consider improvability when considering "navigable waters" as an *undefined* term in the River and Harbor Act of 1899. Clearly, in this only mention of §3(8) in the entire opinion, this Court was supporting its "improvability" criterion as

8. It was so recognized, and sharply criticized as such, in the dissenting opinion. 311 U. S. at p. 433.

9. "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in §3, 16 USCA §796(8), of the Water Power Act by defining 'navigable waters' as those 'which either in their natural or improved condition' are used or suitable for use." (311 U. S. at p. 407.)

within the power of Congress,[10] and was not purporting to construe §3(8) or any other provision of the Act.

If emphasis of this fact were needed, it is evident from a comparison of the "improvability" criteria of §3(8) and of *Appalachian*. In the latter, the Court was expressing the concept in the broadest terms of the power of Congress.[10] Thus it was stated:

> "* * * Nor is it necessary that the improvements should be actually completed or even *authorized*." (311 U. S. at p. 408; emphasis supplied.)

In contradiction, §3(8) expresses a sharply narrowed concept. Suitability for improvement is confined to "such other parts of streams as shall have been *authorized by Congress for improvement* * * * or shall have been *recommended to Congress for such improvement* after investigation under its authority."

That any lower courts have misconstrued *Appalachian* as "fully applicable to the definition of 'navigable waters' in Section 3(8)" (opinion below, pp. 4a and 5a, *infra*), is one excellent reason for this Court now to correct their error. But in almost all of the cases cited as precedents by the Court of Appeals, the decision did not turn on the application of criteria newly announced in *Appalachian;* and in none was the argument here presented considered.

In *Citizens Utilities Co.* v. *Federal Power Commission*, 279 F. 2d 1 (2d Cir. 1960), *cert. denied* 364 U. S. 893 (1960), and *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (5th Cir. 1946), two of the precedents cited by the court below, the issue was not whether a hydro project was on "navigable waters" as defined in the

10. "The power of Congress over commerce is not to be hampered because of the necessity for reasonable improvement to make an interstate waterway available for traffic." (311 U. S. at p. 408.)

Act, but whether a project on a *non*-navigable part of a stream would affect the "interests of interstate and foreign commerce". This, before *Union Electric, supra,* involved a determination whether there would be a downstream effect on a "navigable water" in the constitutional, rather than the defined sense; and *Appalachian* could properly be applied. The portions found navigable in both cases met at least one of the common criteria of §3(8) and *Appalachian*, actual use, or suitability for use, in interstate commerce. In *Citizens*, §3(8) was not even mentioned. In *Georgia Power* it was not relied on, but was erroneously mentioned.[11] Neither case is authority for engrafting new *Appalachian* criteria on §3(8).

Pennsylvania Water & Power Co. v. *Federal Power Commission*, 123 F. 2d 155 (D.C. Cir. 1941), *cert. denied*, 315 U. S. 806 (1942), did not even mention, much less pur-

11. "In the Appalachian Electric Power Co. case, the court had under consideration the Federal Power Act which defines navigable waters in these words: * * *" (152 F. 2d at p. 912). As we have seen, this Court had no such thing under consideration. It is unfortunate that *Appalachian* has been misunderstood, and at one point the Commission recognized this and tried to clarify the situation. In 1947 the Commission was opposing a proposed amendment of Part I of the Federal Power Act, including §3(8), which would have narrowed the expanded licensing jurisdiction then recently exercised by the Commission. The proponents thought the expanded jurisdiction was derived from *Appalachian*, and Mr. Gatchell, Principal Attorney and later General Counsel for the Commission appeared before a Subcommittee of the House Committee on Interstate and Foreign Commerce holding hearings on the bill, and attempted to allay fears of *Appalachian*, the New River case. He said: "¶I might at this point call attention to the New River case, because that case seems to have troubled most of those proponents of these amendments in a way which I think is most unfortunate. ¶"In the first place, that case was not brought under the Federal Water Power Act, as it was called at that time. ¶"Secondly, it was not brought by the Federal Power Commission. ¶"Thirdly, it does not involve the definition of *navigable waters within that act.*" (Hearings on H.R. 2973, 80th Cong., 1st Sess., pp. 379, 380; emphasis supplied).

port to apply, §3(8), and thus did not touch on the question here presented. It was improperly cited as a precedent by the court below.

Another case cited as having "considered the question" is *Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334 (7th Cir. 1954), *cert. denied*, 348 U. S. 883 (1954). But there the court really did not consider the question here presented, as appears from the only mention of *Appalachian*, at p. 337:

> "* * * Both sides cite United States *v.* Appalachian Electric Power Co., 311 U. S. 377. It is noteworthy that the court there said, 311 U. S. at page 405: 'It is obvious that the uses to which the streams may be put vary from the carriage of ocean lumber to the floating out of logs;* * *.'"

Montana Power Co. v. *Federal Power Commission*, 185 F. 2d 491 (D.C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951), also cited by the court below, did not consider the question here presented. Although it cited *Appalachian*, its determination of "navigable waters" rested on "three tests laid down by §3(8)"[12], present suitability for use, authorization by Congress for improvement, and recommendation to Congress for improvement.

The only case cited by the court below in which the question here presented appears to have been even slightly considered is *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (7th Cir. 1945), *cert. denied*, 325 U. S. 880 (1945). In that case the issue was whether "the interests of interstate or foreign commerce" would be affected by the reconstruction of a dam on the Wisconsin River. The issue was *not* whether the dam was on "navigable waters" as defined in §3(8), but on

12. 185 F. 2d at p. 495.

"navigable waters" within the power of Congress. It was accordingly proper for the court to apply the broader judicial criteria, including *past* use. The past use criterion was rested on *Economy Light & Power Co.* v. *United States, supra* (cf. footnote 7). Notwithstanding that *Economy* was decided *after* §3(8) was enacted, immediately after a lengthy citation of *Economy* appears the following:

> "The claim is also made that since the passage of the Federal Power Act, the cases just cited are inapplicable.
>
> "The argument is that Congress was aware that many streams are 'no longer useful and have no prospect of being useful as avenues of commerce' and if Congress had intended to give the Commission jurisdiction over all navigable waters, it would not have added the phrase 'are used or suitable for use'.
>
> "To agree with this argument we would have to disregard United States *v.* Appalachian Power Co., supra. In that case the court, 311 U. S. at page 408, said: 'When once found to be navigable a waterway remains so.' * * *"[13] (147 F. 2d at pp. 747, 748)

The "claim" rejected by the court was at best a confused one, and in the context of the issue in the case, an erroneous one. The court's dicta in rejecting the claim, to the extent that it may support the engrafting of additional criteria on §3(8), is erroneous. In no event does it show such a consideration of the question here presented as to have true precedential value.

Before going further, it may be well at this point to recapitulate. We have shown the clear distinction between

13. In *Appalachian* this statement was made on the authority of *Economy, supra.*

"navigable waters" as an undefined term, in its broadest constitutional sense, as declared in *Appalachian,* and in its narrower meaning as defined in §3(8). We have pointed out that the Court below applied two broad criteria of *Appalachian,* suitability for past use in interstate commerce, and "improvability", which are not found in §3(8). It found no substantial evidence to support "improvability"; but it affirmed the Commission's order as to the Rochester plants because it found substantial evidence of past suitability for use. The court applied the *Appalachian* criteria solely on the basis of what it considered precedent. We have seen that the so-called precedent is not remotely authoritative.

In this posture, the answer to the question before the court below—may *Appalachian* criteria be engrafted on §3(8)—comes before this court wholly unsupported by precedent or principle. In its specifics, it is a new question before this court. In principle this court has in recent cases provided so clear an answer that not only should certiorari be granted, but the judgment below should be summarily reversed.

Does the Federal Power Act mean what it says? As recently as May 3, 1965, this court said, yes. In *Union Electric, supra,* it sustained the Commission's contention that the quoted phrase "interests of interstate or foreign commerce" which may be affected by a pumped storage project on a non-navigable water of the United States means just what it says, and should not be limited by words which are not there. Thus the court held that the phrase "affects the interests of commerce" was not restricted to commerce on navigable waters, but "strongly implies that Congress drew upon its full authority under the Commerce Clause, including but not limited to its

power over water commerce." (85 Sup. Ct. 1253, at p. 1257.)

This latest construction of the Federal Power Act as meaning what it says was made over the objection in the dissenting opinion that it is "based on an overly literal reading of the statute."

As a defined term, "navigable waters" should *a fortiori* be construed to mean what §3(8) says it means—no more and no less.

This Court has also recently noted that differences in meaning may be accorded a statutory term, depending on whether it is defined or undefined by the statute. In *United States* v. *California*, 85 Sup. Ct. 1401, decided May 17, 1965, the court was concerned with the meaning of the phrase "inland waters" as used in the Submerged Land Act (43 U.S.C. §1301 *et seq.*)[14]. Because the term was not defined in the Act, the court looked to its legislative history. It found that, as first written, "inland waters" was defined, but the definition was later removed in Committee. Said the court:

> "* * * By deleting the original definition of 'inland waters' Congress made plain its intention to leave the meaning of the term to be elaborated by the courts, independently of the Submerged Lands Act." (85 Sup. Ct. 1401, at p. 1408.).

Conversely, where Congress defines a term, it makes plain its intention *not* to leave the meaning of the term to be elaborated by the courts, independently of the definition. This Court has explicitly recognized this principle

14. It is interesting to note that in the Submerged Lands Act "navigable waters" is used as an undefined phrase. It grants to the States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States * * *" (43 U.S.C. §1311(a))

in a decision later than any of the "precedents" cited to support the decision below. This Court has explicitly recognized this principle in a decision dealing with the very Act and the very section (but not subsection) with which we are here concerned.

In *Federal Power Commission* v. *Tuscarora Indian Nation*, 362 U. S. 99 (1960), this Court held that the definitions of Section 3 of the Act are controlling, notwithstanding that other than the defined meaning may be generally accepted. It there appeared that a certain Commission finding was required for a license embracing lands of the Tuscarora if the term "reservation" as used in §4(e) of the Act applied to those lands. It was held that the definition of "reservation" in §3(2) was controlling, in these words (p. 111):

> "* * * That by generally accepted standards and common understanding these Tuscarora lands may be part of a 'reservation' is not at all decisive of whether they are such within the meaning of the Federal Power Act. Congress was free and competent artificially to define the term 'reservations' for the purposes it prescribed in that Act. And we are bound to give effect to its definition of that term, for it would be idle for Congress to define the sense in which it used it 'if we were free in despite of it to choose a meaning for ourselves.' Fox *v.* Standard Oil Co., 294 U. S. 87, 96. By §3(2) of the Federal Power Act, 16 USC §796(2), Congress has provided:
>
> 'SEC. 3. The words defined in this section shall have the following meanings for the purposes of this Act to wit:
>
> * * * *
>
> '(2) 'Reservations' means' [etc., etc.]"

Congress was free and competent to define the term "navigable waters" for the purposes it prescribed in the Act. And the Court below was bound to give effect to its definition of that term. It is plain that it did not do so.

Conclusion

We have here an important question of statutory interpretation. It is a matter of first impression in this Court. We have also directly involved a question of the scope of a decision of this Court which has surely been misunderstood, and we believe grossly misapplied.

On the basis of decisions of this Court within the last five years, on the basis of well-established principles of statutory construction, there is no foundation for the decision of the court below. There is no authoritative precedent for it. The question whether the definition in §3(8) means what it says is a simple one, susceptible only of the simple answer, yes.

For all of the reasons stated, this Court should grant a writ of certiorari, and thereupon forthwith reverse the judgment of the court below.

Respectfully submitted,

EDWARD F. HUBER
61 Broadway
New York, New York 10006

T. CARL NIXON
31 Exchange Street
Rochester, New York 14614
Attorneys for Petitioner.

APPENDIX

Decision of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 285—September Term, 1964.

(Argued January 25, 1965 Decided April 6, 1965.)

Docket No. 29181

ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

Before:

WATERMAN, SMITH and ANDERSON,
Circuit Judges.

Petition to review an order of the the Federal Power Commission directing petitioner to apply for licenses under the Federal Power Act for four hydroelectric projects on the Genesee River. Order affirmed as to three projects and vacated as to one.

NIXON, HARGRAVE, DEVANS & DOYLE; NAYLON, ARONSON, HUBER & MAGILL (Edward F. Huber, Daniel G. Kennedy, James M. Baisley, Albert L. Breswick, of counsel), *for Petitioner.*

Decision of United States Court of Appeals for the Second Circuit

RICHARD A. SOLOMON, General Counsel; Howard E. Wahrenbrock, Solicitor; Joseph Hobbs, George Bruder, Attorneys, Federal Power Commission, *for Respondent.*

WATERMAN, *Circuit Judge*:

The Genesee River rises in the Allegheny Mountains of Pennsylvania and flows northward for 158 miles through New York State to Lake Ontario. Petitioner operates three hydroelectric projects on a stretch of rapids and falls in Rochester, New York, six miles from the mouth of the river. It maintains a fourth power project in Mount Morris, New York, on another turbulent stretch of the river sixty-five miles from the mouth.

Petitioner requested the Federal Power Commission to issue an order declaring that these projects did not have to be licensed under Section 23(b) of the Federal Power Act, 16 U. S. C. §817. The Commission rejected the request and directed petitioner to apply for licenses for the projects within ninety days. Petitioner asks us to review the Commission's order pursuant to Section 313(b) of the Act, 16 U. S. C. §8251(b).

The parties agree that petitioner must comply with the Commission's order if, but only if, the four projects are located on "navigable waters" within the meaning of Section 3(8) of the Act, 16 U. S. C. §796(8):

> "'[N]avigable waters' means those parts of streams or other bodies of water over which Congress has

jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids. . . ."

The parties also agree that the Genesee River need not be navigable for its entire length to be "navigable waters" at Rochester and Mount Morris; that the river is navigable from its mouth to the rapids and falls in Rochester; and that these rapids and falls are "navigable waters" if the river is navigable above them. See *United States* v. *Appalachian Elec. Power Co.*, 311 U. S. 377, 409, 410 (1940); *Citizens Utils. Co.* v. *FPC*, 279 F. 2d 1 (2 Cir.), *cert. denied*, 364 U. S. 893 (1960); *Montana Power Co.* v. *FPC*, 185 F. 2d 491, 494 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 947 (1951). In short, this appeal turns on whether the Genesee River is navigable from above the rapids and falls in Rochester to the power project at Mount Morris.

The parties disagree, however, on what constitutes navigability under Section 3(8). Petitioner argues that the Genesee River is "navigable waters" only where (1) it is *presently* being used or is suitable for use in its natural or *presently* improved condition. The Commis-

sion contends that, in addition, the Genesee River is "navigable waters," where (2) in the *past* it was used or was suitable for use in its natural or improved condition, or where (3) it can be made suitable for use by reasonable *future* improvements.

The Commission relies heavily on *United States* v. *Applachian Elec. Power Co., supra* at 407-10. There the Supreme Court stated, with regard to use or suitability for use in the *past:* "When once found to be navigable, a waterway remains so. . . . Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." In the same passage the Supreme Court stated, with respect to suitability for use in the *future:* "In determining the navigable character [a river] it is proper to consider the feasibility of interstate use after reasonable improvements which might be made. . . . Nor is it necessary that the improvements should be actually completed or even authorized."

Petitioner contends that *United States* v. *Appalachian Elec. Power Co.* is inapplicable here, because that case arose out of Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U. S. C. §§401, 403, and therefore did not involve interpretation of Section 3(8) of the Federal Power Act. However plausible this contention may have been at one time, it is no longer arguable now. Every court which has considered the question, including our own, has treated the quoted portions of *United States* v.

Appalachian Elec. Power Co. as fully applicable to the definition of "navigable waters" in Section 3(8).[1]

Accordingly, we hold that the Genesee River is "navigable waters" from Rochester to Mount Morris, if (1) it *presently* is being used or is suitable for use, or (2) it has been used or was suitable for use in the *past*, or (3) it could be made suitable for use in the *future* by reasonable improvements.

The parties agree that these criteria of navigability raise issues of fact and that, pursuant to Section 313(b), the Commission's findings thereon are conclusive "if supported by substantial evidence." *Wisconsin Pub. Serv. Corp.* v. *FPC, supra* at 748; cf. *United States* v. *Appalachian Elec. Power Co., supra* at 405. The Commission notes that none of its previous findings of navigability have ever been set aside by the courts. We congratulate the Commission on its achievement, which is undoubtedly attributable to the full factual foundation on which its findings have heretofore been based. This successful performance, however, does not relieve the Commission of the continuing obligation to rely on evidence that is substantial when it determines that a river is navigable.

In this proceeding the Commission adduced no evidence of its own, and cited no factual sources from outside the

1. *Citizens Utils. Co.* v. *FPC, supra* at 3; *Montana Power Co.* v. *FPC, supra* at 494-95; *Pennsylvania Water & Power Co.* v. *FPC*, 123 F. 2d 155, 158 (D.C. Cir. 1941), *cert. denied*, 315 U. S. 806 (1942); *Georgia Power Co.* v. *FPC*, 152 F. 2d 908, 912-13 (5 Cir. 1946); *Wisconsin Pub. Serv. Corp.* v. *FPC*, 147 F. 2d 743, 748 (7th Cir.), *cert. denied*, 325 U. S. 880 (1945). See *Wisconsin* v. *FPC*, 214 F. 2d 334, 337-38 (7 Cir.), *cert. denied*, 348 U. S. 883 (1954).

record in its decision, but relied wholly on the data contained in petitioner's application for a declaratory order, even though petitioner may not have set forth as full a statement of the case as the Commission's rules require. Of course it was the Commission's prerogative to decide the case on this basis so long as the evidence before it was sufficient. But under the circumstances we are unsympathetic to the Commission's belated attempt to buttress its decision on appeal with factual matter from historical treatises which are cited for the first time in its brief.

The Commission made no finding that the Genesee River, except for the six miles at its mouth, *presently* is being used or is suitable for use as an avenue of interstate or foreign commerce.

The Commission found that the Genesee River has been used or was suitable for use in the *past* from above the rapids and falls in Rochester to the power project at Mount Morris. This finding was based on the following statements in petitioner's application for a declaratory order:

> "Rochester, New York, was first settled in 1812. In the 28 years between that time and 1840, the early settlers made repeated attempts to employ the river channel for navigation by flat-bottomed barges and rafts. The early settlers sent rafts carrying potash, pearlash, and lumber by river to Rochester. Early farmers also rafted some of the wheat grown in the valley to the Rochester mills.
>
> • • • • •

"There is evidence that subsequent to the opening of the Erie Canal in 1825 goods were transported downriver [to just above the rapids and falls in Rochester] for shipment on the Erie Canal. . . . [A]vailable evidence [does not] establish that any commercial shipment of goods downriver was ever initiated as far south as the Mount Morris plant.

* * * * *

"As early as 1825 plans were initiated for the construction of the Genesee Valley Canal, which would parallel the Genesee River from Rochester as far south as Mount Morris, to provide a waterway for the shipment of goods to Rochester and to the Erie Canal. Construction of this particular segment of the Genesee River Canal was completed and opened in 1840. The Genesee Valley Canal was itself abandoned by the State of New York on September 30, 1878. . . ."

We hold that petitioner's statements regarding use of the river channel from 1812 to 1840 constituted substantial evidence supporting the Commission's finding that the Genesee River is "navigable waters" above the rapids and falls in Rochester. Accordingly, we affirm the Commission's order insofar as it directs petitioner to apply for licenses for the three power projects in Rochester.

Petitioner contends that the use of the river between 1812 and 1840 was too limited and too brief to demonstrate navigability. We disagree, having in mind the rule that "small traffic compared to the available com-

mores of the region is sufficient," and that disuse attributable to "improved highways does not affect the navigability of rivers." *United States* v. *Appalachian Elec. Power Co.*, *supra* at 409-10. In this case the use occurred at an early stage in the economic development of the region, and the river was abandoned only when an improved waterway became available.

Petitioner also contends that there is no evidence that the goods shipped down the river entered into interstate or foreign commerce. Perhaps the Commission was justified in inferring that some of these goods eventually must have crossed state or national boundaries. In any event, we agree with the Commission that actual use of a river for intrastate shipments demonstrates its suitability for use as a connecting waterway for interstate or foreign shipments. Especially is this true where the river runs directly into acknowledged avenues of interstate or foreign commerce, here the Erie Canal and Lake Ontario. *See United States* v. *Appalachian Elec. Power Co.*, *supra* at 406 n. 21, quoting *The Daniel Ball*, 10 Wall. 557, 563 (U. S. 1871).

On the other hand, we hold that the statements quoted above from petitioner's application did not constitute substantial evidence that the Genesee River had been used or was suitable for use as far upstream as the power project at Mount Morris. The Commission relies on the following inferences: if milled lumber was rafted downstream from below Mount Morris, logs must have been floated downstream to the mills from above Mount Morris; the naming of towns located on the river above Mount

Morris, "Portage" and "Portageville," shows that the river above Mount Morris was used for transporting goods; and the Genesee Valley Canal would not have been extended through Mount Morris if there had not already been commercial traffic on the river as far upstream as Mount Morris. With all due allowance for the Commission's expertise,[2] we cannot agree that these inferences were supported by substantial evidence.

The Commission also argues that the Genesee Valley Canal, which ran through Mount Morris, can be considered an improvement of the river itself. However, canal traffic made no use whatever of the river bed except at occasional crossing points. Thus the canal was no more an improvement of the river than was the Pennsylvania Railroad branch line which in turn superseded the canal. The Commission stresses Judge Groner's statement in *Pennsylvania Water & Power Co. v. FPC*, *supra* at 161, that the Susquehanna River, "with the aid of canals along its banks, bore a considerable interstate commerce for a long period of years." However, even after the completion of the Susquehanna and Tidewater Canal, "arks which were too wide to pass through the locks were navi-

2. According to the Commission's Brief on Appeal, pp. 27-28: "As a physical anthropologist can determine the age of a person at death, the sex, and sometimes even the stature from two or three bones or fragments of bones from the skeleton, so the Commission's specialized observation, study, and experience by 1964 enable it to reach firm conclusions from fragmentary facts which, as isolated facts, might be meaningless or susceptible to opposing inferences by a jury unassisted by an expert (i.e., someone having the benefit of specialized observation, study, and experience)."

gated in the river itself during periods of high water." 2 F. P. C. 61, 68 (1939).

The Commission found that the Genesee River from Rochester to Mount Morris could be made suitable for use in the *future* by reasonable improvements. This finding was based on data attached to petitioner's application which indicates an average stream flow at Mount Morris of about 1600 cubic feet per second and an average stream slope from Rochester through Mount Morris to Portage of about 3.9 feet per mile. The Commission's finding was also based on statements in the report of the New England-New York Inter-Agency Committee, *The Resources of the New England-New York Region*, "Genesee River Basin" §VIII, at 2-3 (1955):

> "The River and Harbor Act of 1950 authorized a study of the Allegheny and Genesee Rivers with a view to providing a through waterway. The preliminary examination submitted in response to this authorization was unfavorable.
>
> * * * * *
>
> "Present facilities for navigation are considered adequate. No further development of these facilities in the Genesee River Basin is contemplated at this time."

The Commission contends that the flow and slope of the Genesee River compare favorably with the flows and slopes of other rivers held to be navigable by the courts since *United States* v. *Appalachian Elec. Power Co.* It

is noteworthy, however, that of the rivers with lesser flows, three are useful only for recreation or for floating logs,[3] and the fourth was treated by the court as navigable for less than a mile.[4] It is noteworthy, also, that the gradient of the Genesee River in the twenty-one miles on either side of Mount Morris averages 10.5 feet per mile, which is considerably steeper than were the applicable slopes in the other court cases principally relied on by the Commission.[5] In any event, flows and gradients alone do not demonstrate the physical eligibility of a river for reasonable improvement. One also needs to know widths, depths, contours, velocities, and similar characteristics which do not appear anywhere in the evidence. *See Montana Power Co.* v. *FPC, supra* at 495.

As for the statements in the report quoted above, the Commission claims that they are indicative of the river's continuing susceptibility to reasonable improvement. On the contrary, they signify to us that improvement of the river is unfeasible for the time being. Indeed, on this branch of the case the Commission seems to have completely overlooked the test of economic practicability laid down in *United States* v. *Appalachian Elec. Power Co., supra* at 408-09: "There must be a balance between cost and need at a time when the improvement would be use-

3. *Namekagon Hydro Co.* v. *FPC*, 216 F. 2d 509 (7 Cir. 1954); *Wisconsin* v. *FPC, supra; Wisconsin Pub. Serv. Corp.* v. *FPC, supra.*

4. *Citizens Utils. Co.* v. *FPC, supra.*

5. *United States* v. *Appalachian Elec. Power Co., supra* (4.5 feet per mile); *Montana Power Co.* v. *FPC, supra* (3.8 feet per mile).

ful." Compare *Pennsylvania Water & Power Co.* v. *FPC*, *supra* at 161. Accordingly, we hold that the Commission's finding with regard to the river's suitability for use in the future was based on considerably less than substantial evidence.

The order of the Commission is vacated insofar as it directs petitioner to apply for a license for the power project in Mount Morris. The case is remanded to the Commission for the taking of additional evidence on the navigability of the Genesee River at Mount Morris and for findings on this issue in conformity with our opinion. Otherwise, as noted above, the order of the Commission is affirmed.

Declaratory Order

(R 123-126)

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Harold C. Woodward, and David S. Black.

Rochester Gas and Electric Corporation — Docket No. E-7154

DECLARATORY ORDER

(Issued July 7, 1964)

Rochester Gas and Electric Corporation (Petitioner) of Rochester, New York, filed a petition, including a statement of facts, pursuant to Section 1.7(c) of the Commission's Rules of Practice and Procedure, for a declaratory order to remove any uncertainty as to Petitioner's need under the Federal Power Act for a license to continue to maintain and operate its four hydroelectric projects on the Genesee River. Three of these projects, called Stations 5, 2 and 26, whose installed capacities are 6,500 kw, 38,250 kw and 3,000 kw, respectively, are in Rochester, and the fourth, Station 160, with an installed capacity of 425 kw, is some thirty miles southwesterly at Mount Morris, New York.[1]

1. These projects are located at river miles 6.0, 7.5, 8.2, and 66.5, respectively.

Petitioner contends that these projects are not located on navigable waters of the United States.[2] We find that this contention is not sustained by the facts set forth in the petition.

Rising in the Allegheny Plateau in Potter County, Pennsylvania, north of the Susquehanna basin, the Genesee River flows northward for about 158 river miles, crossing New York State and discharging into Lake Ontario. It has a drainage area of 2,753 square miles and an average discharge of 2,476 cfs. Its principal tributaries are Canaseraga and Honeoye Creeks from the east and Oatka and Black Creeks from the west. The river has two major stretches of rapids and falls, one at Portageville, river miles 88 to 84, where it descends 380 feet, and another at Rochester, river miles 8.2 to 6.0, where it descends 260 feet. From below the Rochester rapids and falls about three miles above Lake Ontario, the river has been improved by the Federal government to accommodate deep-draft commercial vessels used in the Great Lakes traffic.

There is abundant historical evidence that the Genesee River also has supported commerce above this improved stretch. Settlers of the Genesee Valley in the early

2. Subsection 23(b) of the Federal Power Act reads in pertinent part:

> (b) It shall be unlawful for any person . . ., for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto across, along, or in any of the navigable waters of the United States . . ., except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act (16 U.S.C. 817).

decades of the nineteenth century rafted potash, pearlash, lumber, and wheat to Rochester. After 1825, they sent goods downstream for shipment on the then-completed Erie Canal, which crossed the river just above the Rochester rapids and falls at river mile 11.2. Between 1837 and 1857, the State of New York built the Genesee Valley Canal along the Genesee River and certain of its tributaries. The eastern branch of this canal reached Dansville, New York, and the western branch, having reached Olean, New York, followed the Allegheny River to the Pennsylvania border. The Genesee Valley Canal connected with the Erie Canal at Rochester. The canal operated until 1878.

The Genesee River with reasonable improvements could again support interstate traffic. As recently as 1950, Congress authorized preliminary examination and survey of a through waterway to the Allegheny River.[3] Although construction was not recommended, there might be further development in the future.[4]

Three of Petitioner's projects, stations 2, 5 and 26, are located in the Rochester rapids and falls. Under the definition of navigable waters in the Federal Power Act[5]

3. River and Harbor Act of 1950 (64 Stat. 169).

4. The New England-New York Inter-Agency Committee in 1955 said in its report on The Resources of the New England-New York Region, Genesee River Basin, Part Two, Chapter XXXIII, Section VIII at page 3: "Present facilities for navigation are considered adequate. No further development of these facilities in the Genesee River Basin is contemplated *at this time.*" (Emphasis added.)

5. Section 3(8) reads:

> (8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among

and leading Supreme Court decisions on navigability,[6] Petitioner is not relieved of the licensing provisions of the Federal Power Act because these projects are located in a stretch of rapids and falls on a navigable stream.

The Commission finds:

(1) The Genesee River from above the Rochester Gas and Electric Company's project works to its mouth at Lake Ontario is a "navigable water of the United States" within the meaning of subsection 23(b) of the Act.

(2) Rochester Gas and Electric Corporation maintains and operates four hydroelectric projects, designated Stations 2, 5, 26 and 160, across, along, or in the Genesee River without a permit or a valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to the Federal Power Act.

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the several States, and which either in their natural or improved condition *notwithstanding interruptions between the navigable parts of such streams or water by falls, shallows, or rapids compelling land carriage*, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such investigation under its authority . . . (Emphasis added).

6. "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages." (Economy Light Co. v. United States, 265 U. S. 113, 122 (1920)). See also: The Montello, 87 U. S. (20 Wall.) 430, 442-443 (1874); United States v. Utah, 283 U. S. 64 (1930); United States v. Appalachian Power Co., 311 U. S. 377 (1940).

Declaratory Order

The Commission orders:

Rochester Gas and Electric Corporation shall, within ninety (90) days of the issuance of this order, file application for a license pursuant to the provisions of the Federal Power Act and the Commission's Rules and Regulations thereunder, for the continued maintenance and operation of its project works in and along the Genesee River at Rochester and Mount Morris, New York.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

Order Denying Rehearing

(R 145-148)

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., David S. Black.

Rochester Gas and Electric Corporation — Docket No. E-7154

ORDER DENYING REHEARING

(Issued August 28, 1964)

On March 2, 1964, the Rochester Gas and Electric Corporation petitioned for a declaratory order that it does not require a license for the continued maintenance and operation of its four hydroelectric projects on the Genesee River, New York. The Corporation contended that the projects are not located on navigable waters of the United States. On facts stated in the Corporation's petition, the Commission on July 7, 1964, found that: (1) the Genesee River from above the Rochester Gas and Electric Company's project works to its mouth at Lake Ontario is a "navigable water of the United States" within the meaning of subsection 23(b) of the Federal Power Act; (2) Rochester Gas and Electric Corporation maintains and operates four hydroelectric projects, designated Stations 2, 5, 26 and 160, across, along, or in the Genesee River without a permit or a valid existing right-of-way granted prior to June 10, 1920, or a

license granted pursuant to the Federal Power Act. We ordered the Corporation to apply for a license for such projects.

The Corporation applied for rehearing on August 3, 1964. The Corporation acknowledges that the Genesee River has supported commerce, but contends that there is no evidence that this commerce was of an interstate character. The uncontested facts show that before the improvement of the river, agricultural and other products were rafted downstream to Rochester, New York, and after the completion of the Genesee Valley Canal, barges plied between Rochester and the Pennsylvania border.

It is inconceivable that some of the goods in this traffic never entered interstate or foreign commerce either by transshipment at Rochester to or from the Great Lakes or the Erie Canal, both of which the Supreme Court has declared to be navigable waters of the United States,[1] or by crossing the Pennsylvania border at the opposite end of the Genesee Valley Canal. In any event, the mere capability of use by the public for purposes of transportation in interstate or foreign commerce affords the true criterion of navigability.[2]

The Corporation argues that, even if the Genesee River has supported interstate commerce, it was not "substantial and permanent." It is clear that the navigation upon the Genesee River is at least as extensive as upon certain other streams which have been declared navigable

1. *The Genesee Chief* v. *Fitzhugh*, 53 U. S. (12 How.) 443, 457 (1851) (Lake Ontario); *The Robert W. Parsons*, 191 U. S. 17, 28 (1903) (Erie Canal).

2. *The Montello*, 87 U. S. (20 Wall.) 430, 441 (1874); *United States* v. *Appalachian Power Co.*, 311 U. S. 407 (1940).

waters of the United States. For example, conditions on the Fox River, Wisconsin, having its headwaters near Portage, Wisconsin, and its mouth at Green Bay, are very similar to those on the Genesee River. The Fox River was made difficult for navigation in its natural state by several rapids, two of the largest which are Grand Chute and De Pere. "It is true," as the Supreme Court observed, "without the improvement by locks, canals," and dams the Fox River through its entire length could not be navigated by steam boats or sail vessels . . . ."[3] The Fox River was used as a waterway between Green Bay and the Wisconsin River. It was found to be a navigable water of the United States in *The Montello.*[4]

The Supreme Court has stated expressly that it is not necessary for navigability that the use should be permanent. This principal is contained in *Economy Light and Power Co.* v. *United States*[5] and *United States* v. *Appalachian Power Co.*[6] The navigation upon the Genesee River is at least as enduring as upon the waterways involved in these cases. In the *Economy* case, the Supreme Court said:[7]

> The Desplaines River, after being a practical service as a highway of commerce for a century and a half, fell into disuse, partly through changes in the course of trade, or methods of navigation, or

3. *The Montello,* 87 U. S. (20 Wall.) 430, 441 (1874).
4. *Id.*
5. 256 U. S. 113, 114 (1921).
6. 311 U. S. 377, 409 (1940).
7. See note 5.

> changes in its own condition, partly as the result of artificial obstructions.
>
> *In consequence, it has been out of use for one hundred years; but a hundred years is a brief space in the life of a nation;* improvements in the methods of water transportation or increased cost in other methods of transportation may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition and require only the exertion of federal control to make them again important avenues of commerce among the States. *If they are to be abandoned, it is for Congress, not the courts, so to declare.* (Emphasis added.)

The Corporation alleges, at least by implication, that a canal using water from a river and running beside it is not a reasonable improvement of the river, even if the barge traffic in places travels in the channel of the river itself. For purposes of determining Congress' control of waterways under the commerce clause, there is no distinction between improvements for navigation actually in the bed of a stream and those merely along it.[8] Both are subject to national planning and control in the regulation of interstate and foreign commerce.[9]

The Corporation challenges the constitutionality of Section 3(8) of the Federal Power Act (16 U.S.C. 796), defining navigable waters, on the ground that it improperly

8 See *The Robert W. Parsons,* 191 U. S. 17, 26-27 (1903) and *United States* v. *Cress,* 243 U. S. 316, 326 (1917).

9. *United States* v. *Appalachian Power Co.,* 311 U. S. 377, 426 (1940).

includes "interruptions between the navigable parts of . . . streams or waters by falls, shallows, or rapids compelling land carriage." This section, far from innovating in defining navigable waters, was in effect a codification of the extensive case law on the subject. The Supreme Court cases cited in note 6 of our declaratory order refute any suggestion that the section is unconstitutional. As the Supreme Court observed in *First Iowa Hydro-Electric Cooperative* v. *F.P.C.*,[10] the statutory scheme of the Federal Power Act has been several times reviewed and approved by the courts.

The Corporation denies that there is evidence that, with reasonable improvements, the Genesee River again could support interstate transportation. Aside from the suggestive authorities referred to in notes 3 and 4 of our declaratory order, there is ample support for our holding in Exhibit C, entitled "Genesee River Flows, 1907-1962", of the Corporation's petition. The flows on the Genesee River compare favorably with those of a variety of other rivers which have been declared navigable.

The Corporation's several other contentions are merely ancillary to those set forth and answered above.

The Commission finds:

It is appropriate and in the public interest in administering Part I of the Federal Power Act (16 U.S.C. 791-823) that the Rochester Gas and Electric Corporation's application for rehearing filed on August 3, 1964, on the declaratory order, issued on July 7, 1964, requiring the

10.

Corporation to file application for licenses for its four hydroelectric projects on the Genesee River, New York, be denied.

The Commission orders:

The aforesaid application for rehearing by Rochester Gas and Electric Corporation is hereby denied.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

Statutes Involved

Section 3, subdivision (8) of the Act (16 U.S.C. §796(8)):

> "SEC. 3. The words defined in this section shall have the following meanings for the purposes of this Act, to wit:
>
> • • • • •
>
> "(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land

carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;"

Section 4(e) of Federal Power Act, as amended (16 U.S.C. §797(e)):

"(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: * * *"

* * * * * *

Statutes Involved

Section 4(g) of the Federal Power Act (16 U.S.C. §797(g)):

> "(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region."

Section 23(b) of the Federal Power Act, as amended (16 U.S.C. §817):

> "(b) It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act. Any person,

association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

Section 313(b) of the Federal Power Act, (16 U.S.C. §825 *l* (b))

"(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility

to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Com-

mission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)."

Section 9 of the River and Harbor Act of 1899 (33 U.S.C. §401):

"SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which

lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided, further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and the Secretary of War."

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 306

ROCHESTER GAS & ELECTRIC CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. App. 1a-12a) is reported at 344 F. 2d 594. The opinions of the Federal Power Commission (Pet. App. 13a-23a) are reported at 32 FPC 48 and 668.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1965. The petition for a writ of certiorari

was filed on June 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTION PRESENTED

Whether evidence of past use of a river segment for transportation in interstate commerce is sufficient to sustain a finding that it constitutes "navigable waters" within the meaning of the Federal Power Act.

STATUTE INVOLVED

Sections 3(8), 23(b) and 313(b) of the Federal Power Act (16 U.S.C. §§ 796(8), 817, and 825*l*(b)) are set forth in the appendix to the petition.

STATEMENT

The Genesee River rises in the Allegheny Plateau in Potter County, Pennsylvania, and runs northward about 158 miles, crossing New York State, and discharging into Lake Ontario. On the river, petitioner maintains four hydroelectric developments which were constructed before June 10, 1920, without any federal permit. In response to petitioner's request for a declaratory order, the Commission found that the Genesee River is a navigable water, within the purview of the Federal Power Act, at the sites of all four of petitioner's projects, and accordingly ordered petitioner to apply for a Commission license for all four. The present petition seeks review of the decision of the court below sustaining the Commission's order as to

three of the developments located at a stretch of rapids and falls in Rochester, New York.[1]

Section 3(8) of the Act defines "navigable waters" as including "interrupting falls, shallow, or rapids." Since the river is unquestionably used for navigation downstream from Rochester, petitioner concedes that, under the Act, it is "navigable" at the Rochester falls and rapids if it is "navigable" upstream from Rochester. The only contention it seeks to present to this Court is that admitted navigation upstream in the past does not warrant a finding that the river is "navigable" under the Power Act.

The Commission found that the Genesee River was navigable above the Rochester rapids and falls because it had been used for transportation of goods in the past. Thus, the petition for declaratory order disclosed that, after the Erie Canal was constructed in 1825, goods were transported down the Genesee River to just above the rapids and falls in Rochester for shipment on the Erie Canal, which there crossed the river. Also, between 1812 and 1840, flat-bottomed barges and rafts carrying potash, pearlash, lumber and wheat were transported downstream on the river to Rochester.[2] On the basis of these findings, the

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[1] As to the fourth, the court held the Commission's order unsupported and remanded the case for further proceedings. The Commission is not contesting that ruling at this time.

[2] In 1840, the Genesee Valley Canal was built from Mount Morris to Rochester, about 40 miles downstream on the River. It was later extended upstream beyond Mount Morris. Use of the Genesee Valley Canal was abandoned in 1878 with the coming of the railroads.

Second Circuit sustained the Commission's conclusion that petitioner's plants were located on navigable waters.[3]

ARGUMENT

The decision below is supported by uniform rulings in several courts of appeals and is consistent with, if not actually required by, prior decisions of this Court. There is thus no occasion for further review.

So far as here relevant, Section 3(8) of the Federal Power Act defines "navigable waters" as those which "are used or suitable for use for the transportation of persons or property." It is undisputed that the water here in question has in the past been used for the transportation of property. On the basis of this admitted fact, the Commission and the court below concluded that it is "navigable water" under the Federal Power Act. In so holding, the court below relied on this Court's unequivocal holding in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, that "When once found to be navigable, a waterway remains so. * * * Even absence of use over long periods of years, because of changed conditions, the coming of the railroad or improved highways does not affect the navigability of rivers in the constitutional sense." See also *Economy Light and Power Co.* v.

[3] The Commission had also found that "The Genesee River with reasonable improvements could again support interstate commerce" (R. 4a). The court below did not accept this alternative basis of the Commission's ultimate finding of navigability.

United States, 256 U.S. 113, 124, quoted in the Commission's order denying rehearing (R. 17a-18a).[4]

As the court below states (Pet. App. 4a-5a), "Every court which has considered the question" has treated this Court's holding and discussion in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 407-410, as controlling as to the definition of "navigable waters" under the Federal Power Act. *Citizens Utilities Co.* v. *Federal Power Commission*, 279 F. 2d 1 (C.A. 2), certiorari denied, 364 U.S. 893; *Montana Power Co.* v. *Federal Power Commission*, 185 F. 2d 491 (C.A.D.C.), certiorari denied, 340 U.S. 947; *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C.A. 5); *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743, 748 (C.A. 7), certiorari denied, 325 U.S. 880; *Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334, 337-338 (C.A. 7), certiorari denied, 348 U.S. 883. While petitioner attempts to "distinguish" most of the cases cited (Pet. 13-16), it does not even suggest that there is any conflict among the circuits. Rather it contends that the courts "have misconstrued *Appalachian*" (Pet. 13) or have announced erroneous "dicta" (Pet. 16). But this contention is plainly without merit.

This Court has repeatedly recognized that the Federal Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which

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[4] "R." references are to petitioner's appendix in the court below.

would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so * * *." *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U.S. 152, 180. Similarly, when this Court stated, only last Term, that Congress "most assuredly" exercised "its authority over navigation in the Federal Water Power Act" (*Federal Power Commission* v. *Union Electric Co.*, slip op., p. 15), it was in a context which made clear that Congress' *full* "authority over navigation" was referred to. The meaning of "navigable waters" in the Power Act is thus the same as that stated by this Court in the *Appalachian* case, which was relied upon by the court below.

Moreover, the legislative history of the Power Act clearly supports the view of the Commission and the court below that the term "navigable waters," as used in the Federal Power Act, is at least as broad as it is under the River and Harbor Act of 1899. See H. Rep. 1318, 74th Cong., 1st Sess., p. 26; S. Rep. 621, 74th Cong., 1st Sess., pp. 47; Hearings on H.R. 5423, 74th Cong., 1st Sess., p. 391. It is clear that under the River and Harbor Act the segment of river in issue would be considered navigable waters. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 123 F. 2d 155, 161-162 (C.A.D.C.), certiorari denied, 315 U.S. 806; cf. *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787 (C.A. 2), certiorari denied, 320 U.S. 792; *Wisconsin Public Service Corp.* v. *Federal Power Commission*, *supra*, 147 F. 2d 743, 749.

Finally, petitioner did not raise its present objection to the Commission's order in its application for administrative rehearing, but expressly recognized that prior decisions as to the meaning of the term "navigable waters of the United States" were controlling (R. 8a-9a). It is therefore doubtful whether petitioner can litigate this issue now.[5]

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[5] See, *e.g.*, the following decisions under Section 19(b) of the Natural Gas Act (52 Stat. 831, as amended, 15 U.S.C. 717r(b)), which is identical to Section 313(b) of the Federal Power Act (49 Stat. 860, as amended, 16 U.S.C. 825*l*(b)): *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157-158; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649, 650-651. See *Utah Power & Light Co.* v. *Federal Power Commission*, 339 F. 2d 436 (C.A. 10), applying the rule under the Federal Power Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

JOSEPH B. HOBBS,
JOSEPHINE H. KLEIN,
Attorneys,

Federal Power Commission.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 306

ROCHESTER GAS AND ELECTRIC CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

EDWARD F. HUBER,
61 Broadway,
New York, N. Y. 10006,

T. CARL NIXON,
31 Exchange Street,
Rochester, New York 14614
Attorneys for Petitioner.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

This Brief is submitted by Petitioner in reply to the Brief for the Federal Power Commission (Commission) in opposition to a Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

The Petition presents to this Court *for the first time* the question whether "navigable waters", as used in the Federal Power Act (Act) means only what the Act (§3(8)) defines it to mean, or whether it includes also other criteria of "navigable waters" stated by this Court in *United States* v. *Appalachian Electric Power Co.*, 311

U. S. 377 (1940), a case which arose under the River and Harbor Act of 1899, which did not involve an interpretation of, and did not purport to interpret §3(8) of the Federal Power Act.

The acceptance by the Court below of *past* use or suitability for use as a criterion of "navigable waters" was the sole basis for its sustaining the Commission's finding that Petitioner's hydroelectric plants on the Genesee River in Rochester are on "navigable waters" under the Act. In accepting this criterion despite the fact that "for the purposes of this Act" §3(8) defines "navigable waters" and does not include this criterion, the Court relied exclusively on *Appalachian.*

The question of first impression in this Court here presented is one of great importance, because on its decision depends the scope and extent of the Commission's jurisdiction to license hydroelectric projects in "navigable waters". If the criteria of "navigable waters" judicially stated in *Appalachian,* but unstated in §3(8) of the Act, may nevertheless be engrafted on §3(8), the expanded jurisdiction of the Commission would extend to many hydro projects on streams which are not "navigable waters" under the expressed criteria of §3(8). We again note how apposite is this Court's recent statement in *Federal Power Commission* v. *Union Electric Company,* 85 Sup. Ct. 1253, 1255 (May 3, 1965):

> "• • • Because the question is an unresolved one of jurisdiction over an important class of hydroelectric projects, we granted certiorari, 379 U. S. 812, • • •".

The Brief in Opposition is noteworthy for the issues it does *not* raise, the arguments it does *not* meet, and for statements which have no support other than that they

are sponsored by the Solicitor General. The factual base and legal arguments for granting the writ stated in the Petition are virtually undisputed.

The far-reaching effect of the decision below, as stated in the Petition, and above, *is not disputed.*

That this Court has recognized that the Courts may elaborate the meaning of a statutory term which is *not* defined by the statute,[1] *is not disputed.*

That this Court, conversely, has held that where a statutory term is defined in the statute, *indeed in the very section of the Act we are here concerned with,* the Courts must give effect to the Congressional definition,[2] *is not disputed.*

That the Court below relied exclusively on *Appalachian* in applying past use or suitability for use as a criterion of "navigable waters" as defined in §3(8) *is not disputed.*

That *past* use or suitability for use are criteria of "navigable waters" announced in *Appalachian,* but unstated in §3(8) of the Act, *is not disputed.*

That this Court in *Appalachian* did not purport to interpret §3(8) or any other provision of the Act *is not disputed.*

That this Court in *Appalachian* declared the scope of "navigable water" as an undefined term in its broadest constitutional sense, *is not disputed.*

If we add up what is not disputed it amounts to this: In a case of first impression in this Court involving an unresolved question of jurisdiction over an important class of hydroelectric projects, it appears that the decision of the Court below rests on a clear misapplication of a decision of this Court. Surely this requires that the writ be granted.

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1. *United States* v. *California,* 85 Sup. Ct. 1401 (May 17, 1965).
2. *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U. S. 99 (1960).

But notwithstanding the foregoing, the Brief in Opposition states that there is no occasion for further review because:

> "The decision below is supported by uniform rulings in several courts of appeals and is consistent with, if not actually required by, prior decisions of this Court." (p. 4)

This statement does not provide a valid reason for denying the writ.

That other lower courts have also misconstrued *Appalachian* is an excellent reason for granting the writ, so that this Court may correct their error. In the Petition, pages 13-16, the cases cited by the Court below as precedents for relying on *Appalachian* are examined in detail, and on the basis of such examination are shown to have no precedential value. The Brief in Opposition avoids any discussion of the legal basis for this conclusion, but would dismiss it with a wholly gratuitous and unsupported *ipse dixit*: "But this contention is plainly without merit" (p. 5). The plain fact is, the merit of the contention is really uncontroverted.

The statement in the Brief in Opposition that the decision below "is consistent with, if not actually required by, prior decisions of this Court", is another wholly gratuitous and unsupported *ipse dixit*. No prior decision of this Court is cited as consistent with the decision below. No prior decision of this Court is cited as requiring the decision below. But the fact that there are prior and subsequent decisions of this Court *inconsistent* with the decision below, which were cited and discussed in the Petition (pp. 17-19), is ignored by the Brief in Opposition; and that fact thus stands out as undisputed.

That this Court has recognized that the Act is the outgrowth of conservationist efforts to promote develop-

ment of water resources to the full extent of federal power,[3] or that in the Act Congress has exercised full authority over navigation,[4] does not support the conclusion that "navigable waters" as defined in the Act "is thus the same as that stated by this Court in the *Appalachian* case * * *" (Br. in Opp., p. 6). It does support the contrary. As discussed in the Petition (pp. 9-13), the broadest scope of Congressional authority over navigation is *all* waters of the United States, navigable or not, over which Congress has jurisdiction under the commerce clause. Congress has exercised its full power in the Act by dealing separately with "navigable waters" as defined, and with "other than those *defined herein as navigable waters*" (Act, §23(b), Petition, p. 26a). If "navigable waters" in the Act had not been a defined term, it would properly have been given its broadest meaning in a constitutional sense, as was done by this Court in *Appalachian* with the undefined term in the River and Harbor Act of 1899. Likewise, in that event the subject of the remaining power would have been "non-navigable" waters. The fact that Congress specifically dealt with waters "other than those defined herein as navigable waters" emphasizes that "navigable waters", as defined, was intended to cover no more than the definition stated, and all waters not so covered were to be dealt with otherwise.

The exercise of Commission jurisdiction over "navigable waters" as defined, and other waters, is not the same.

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3. *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission*, 328 U. S. 152, 180. The rationale of this opinion, in any event, is not applicable to the Section 3(8) definition of "navigable waters" which reflects a *"compromise"* between the competing forces of the conservationists and their opponents. The Commission's opinion in the *Union Electric* case, 27 FPC 801, 805, makes this clear.

4. *Federal Power Commission* v. *Union Electric Co.*, 85 Sup. Ct. 1253.

The Commission bases its jurisdiction in this case on "navigable waters", as defined. It cannot sustain it on the basis of a different jurisdiction over *other* than "navigable waters", as defined.

The Brief in Opposition states that the legislative history of the Act supports the view that "navigable waters" as used in the Act is as broad as in the River and Harbor Act of 1899. The only specific references to legislative history relate to the 1935 amendment to §23(b). Even the snatches referred to do not support the statement. The fact is that the 1935 amendment reiterated the significance of "navigable waters" as a defined term by dealing also with waters *"other than those defined* therein as navigable waters". The legislative history of §3(8) makes abundantly clear an intention to legislate specific and limited criteria of "navigable waters", rather than accept judicial criteria.

The Brief in Opposition concludes with a strange suggestion that it is doubtful whether Petitioner's "present objection to the Commission's order" may be litigated because it was not raised "in its application for administrative rehearing" (Br. in Opp., p. 7). If by "present objection" is meant, that the evidence before the Commission did not support the finding[5] on which it is based, of course that objection was raised. If by present objection is meant the objection that criteria of "navigable waters" stated in *Appalachian,* but unstated in §3(8), may not properly be engrafted on §3(8), the objection was not raised; for there was no reason to do so. And when there is no reason to raise an objection on application

5. The Commission found that the Genesee River at the location of all of Petitioner's projects "is a 'navigable water of the United States' within the meaning of subsection 23(b) of the Act" (Petition, p. 16a).

for rehearing, it may properly be considered on review. Act, §313(b) (Petition, p. 27a); *Public Utility District No. 1* v. *Federal Power Commission,* 242 F. 2d 672, 677 (9th Cir., 1957).[6]

It must be remembered that the Commission held no hearing before making its order. The Order was quite obviously based on §3(8), which was quoted in full. The only judicial authorities mentioned, which included *Appalachian,* were cited to the proposition, expressly stated in §3(8), that navigability of a watercourse is not destroyed by natural obstructions. There was thus no reason for Petitioner, in applying for a rehearing, to object to the misapplication of *Appalachian* which the Commission first suggested in its order denying rehearing (Petition, 19a, 20a), and on which it fully supported its order in the Court below.

CONCLUSION

For the reasons stated in the Petition and herein, this Court should grant a writ of certiorari, and thereupon forthwith reverse the judgment of the Court below.

Respectfully submitted,

EDWARD F. HUBER,
61 Broadway,
New York, N. Y. 10006,

T. CARL NIXON,
31 Exchange Street,
Rochester, New York 14614

Attorneys for Petitioner.

6. Here failure to object to the Commission's interpretation of a document made apparent only on the order denying rehearing was held to be reasonable.